Knowledge Exchange
OALP Client Update

Olaniwun Ajayi LP

Global Depositary Receipts

20 July, 2010

CBN Regulation on the Mark Up of the Master CCI on Nigerian GDRs

Over the years, Global Depositary Receipts (GDRs) have proved to be an effective mechanism utilised by corporate bodies to raise funds required to further their business activities. The GDR which is a negotiable certificate that represents an ownership interest in the ordinary shares or stock of a company (Issuer) is usually marketed outside of the Issuer's home country thereby enabling it to have access to a greater amount of investment capital from foreign investors. Investors in a GDR programme are further entitled to the payment of dividends.

GDRs may either be sponsored or unsponsored. Sponsored GDRs are usually issued by one Depositary who is appointed under a Deposit Agreement or Service Contract with the company intending to raise funds. On the other hand, Unsponsored GDRs are issued by one or more Depositaries in response to market demand, but without a formal agreement with the company that owns the underlying shares.

The use of GDRs as a means of raising capital for furtherance of business activities is not novel in Nigeria. To ensure continued attractiveness of Nigerian GDRs to foreign investors, the Central Bank of Nigeria (CBN) issued Circular **TED/FEM/FPC/GEN/01/144** on 3 December 2007. The objective of the December 2007 circular was to align the issuance of GDRs with the requirements of the issuance of Certificates of Capital Importation (CCIs) to foreign investors intending to invest in Nigeria, more particularly, in GDRs. By the December 2007 Circular, foreign investors are able to benefit from the Master CCI issued to the Depositary Bank. The Circular provides that the Depositary's nominee custodian shall have valid CCI covering the number of GDRs withdrawn from the programme and further permits a 'mark down' of the Master CCI in the event of a cancellation of a portion of the GDRs by a foreign investor. The foreign investor who has withdrawn its portion of the GDR is permitted to trade with the underlying shares in the local market via the valid CCI held by the Custodian Bank.

On 24 June 2010, the CBN issued further guidelines via Circular **TED/PFO/FPC/GEN/01/029**, (the "June 2010 Circular") which from all indications, focuses primarily on the issuance of unsponsored GRDs. This note will discuss the key provisions of the June 2010 Circular, whilst also highligting some of the issues that arise from the issuance of unsponsored GDRs in Nigeria.

Foreign Investors in an Unsponsored GDR Programme

The June 2010 Circular provides that a foreign investor intending to convert its existing shares in a Nigerian company into GDRs, should notify the Depositary Bank appointed for the programme. Such foreign investor must have a Central Securities Clearing System (CSCS) account in respect of its ordinary shares and there must be a GDR account opened for the programme with the CSCS. Upon notification, the Depositary Bank would instruct the local Custodian appointed for the programme to accept the relevant shares into the GDR account.

The foreign investor is required to present the CCI that had been issued in its name in respect of its ordinary shares, to the local Custodian and where the CCI was originally issued by another Authorised Dealer other than the one presently in cusody of the CCI, the CCI must be accompanied by a letter of indemnity against double remittance. The investor is then required, through its broker or custodian, to instruct the CSCS to transfer the relevant shares from its account to the GDR account specially created for the GDR programme.

Mark Up of Master CCI

The significant provision in the June 2010 Circular is the express provision for the 'Mark Up' of the Master CCI with the corresponding value of shares being converted to GDRs. Where all of the investor's shares are being converted to GDRs, the June 2010 Circular provides for a cancellation of the investor's CCI and the Custodian Bank is required to return the cancelled CCI to the Director, Trade and Exchange, CBN, together with photocopies of relevant documents evidencing GDR issuance and a letter of indemnity against double remittance. In the event that the value of shares being converted is less than that referred to in the CCI, the Authorised Dealer that issued the CCI or in valid custody of the CCI, is required to make an appropriate notation on the back of the CCI to mark it down with the value of the shares being transferred. The Authorised Dealer shall also forward a photocopy of the 'marked down' CCI together with a letter of indemnity against double remittance, to the local custodian.

A foreigner intending to convert its ordinary shares to GDRs should notify the Depositary Bank of such intention.

Mark Down of Investor's CCI

The Circular requires that where the shares being converted are fewer than that referred to in the CCI, the Authorised Dealer shall make the appropriate notation on the back of the CCI to 'mark it down' with the value of shares being transferred.

The Circular further provides that the Master CCI should be marked up with all bonuses received on the corresponding local shares to the GDRs.

In both cases, the local Custodian will then 'mark up' the Master CCI with the value of shares already cancelled or 'marked down' as the case may be. This is a marked difference from the 2007 Circular which did not expressly provide for the 'mark up' of the Master CCI in a GDR programme bur rather permitted the Custodian Bank to 'mark down' the Master CCI with the value of GDRs cancelled by an offshore investor where he is converting his GDRs to shares.

Summarily, a key benefit of the new circular is that a master CCI issued in respect of an unsponsored GDR programme can now be marked up solely upon transfer of the existing shares into the GDR account and without fresh importation of capital by the Depositary. This was not possible, prior to publication of the June 2010 Circular.

Domestic Investors

It should be noted that the 'mark up' of CCIs does not apply where domestic investors are investing in the GDR product as it is not contemplated that they will purchase the shares of the Nigerian company with foreign currency. In fact, the June 2010 Circular expressly provides that no CCIs should be involved in the process of creating new GDRs for domestic investors that invest in the GDR product.

Limit on Number of GDRs Approved

The June 2010 Circular expressly precludes the conversion of shares in a manner that will make the number of GDRs issued to exceed the number of GDRs approved for the institution in question. It should be noted that the approved number of GDRs is inclusive of the GDRs validly created by the company through bonus issues approved by the relevant regulatory authorities.

Red Flags

The GDRs issued may neither have voting rights nor the rights to receive reports attached to them, as unsponsored GDRs are usually issued without the involvement of the underlying company.

The GDRs may not be tradable on the Nigerian Stock Exchange (NSE).

It is usually more expensive to upgrade an unsponsored GDR to a sponsored GDR.

Conclusion

Clearly, the June 2010 Circular represents a positive step in setting out clearer and more defined guidelines applicable to the GDR programme and issuance of Master CCIs, whilst restoring the confidence of investors in the Nigerian Capital Market.

For further information please contact:

Morenike Olagbaju

Senior Associate

08027255683

Emeka Osuji

Counsel

08090728639

Ijeoma Onweluzo

Counsel

07089996291

Olaniwun Ajayi LP,
The Adunola,
Plot L2,
Banana Island,
Ikoyi, Lagos.
+234 1 270 2551